

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, *et al.*

Plaintiffs,

vs.

TYSON FOODS, INC., *et al.*

Defendants.

Case No. 05CV0329JOE-SAJ

**DEFENDANTS TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN,
INC. AND COBB-VANTRESS, INC.'S MOTION FOR A MORE DEFINITE
STATEMENT WITH RESPECT TO COUNTS ONE AND TWO OF THE AMENDED
COMPLAINT AND INTEGRATED OPENING BRIEF IN SUPPORT THEREOF**

COME NOW the Defendants Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc. and Cobb-Vantress, Inc. (the "Tyson Defendants") pursuant to Federal Rule of Civil Procedure Rule 12(e) and move the Court to enter an order requiring Plaintiffs to provide a more definite statement with respect to Counts One and Two of the Amended Complaint.

I. GENERAL DESCRIPTION OF THE COMPLAINT

This action was initiated with the filing of a Complaint and First Amended Complaint herein by the State of Oklahoma, Secretary of the Environment, C. Miles Tolbert and Attorney General, W.A. Drew Edmondson on June 13, 2005, and August 19, 2005, respectively.¹ In the Complaint, the State Plaintiffs seek damages and injunctive relief for harm they claim has been caused to the lands, waters and sediments in the Illinois River Watershed ("IRW") by the long-

¹ The State, Secretary Tolbert and Attorney General Edmondson are collectively referred to herein as the "State Plaintiffs" and the original Complaint and the First Amended Complaint are collectively referred to hereinafter as the "Complaint." Unless otherwise noted, all citations to specific paragraphs or allegations of the "Complaint" shall be cited by reference to the paragraph numbers of the First Amended Complaint in which those allegations are contained.

standing and state-approved agricultural practice of applying poultry litter to the land as an organic fertilizer and soil conditioner. *See generally*, Complaint.

Although the State Plaintiffs characterize the practices at issue as “disposal” practices, it is clear that their “disposal theory” is dependent upon their allegations that the “Poultry Integrator Defendants” have “repeatedly applied” poultry waste “in amounts that are in excess of any agronomic need and is not consistent with good agricultural practices and, as such constitutes waste disposal rather than the normal application of fertilizer.” (Complaint, ¶¶ 50 and 51.) The State Plaintiffs allege that these practices are carried out by the numerous farmers located throughout the IRW with whom the “Poultry Integrator Defendants” contract for the rearing of poultry. (Complaint, ¶¶ 32-47.) According to the State Plaintiffs, the practices of these farmers have resulted in “the run-off and release of large quantities of phosphorus and other hazardous substances . . . from the fields and into the waters of the IRW.” (Complaint, ¶ 52.)

II. DESCRIPTION OF CLAIMS ASSERTED IN COUNTS 1 AND 2

The State Plaintiffs have included in the Complaint allegations apparently intended to state a claim for damages, remediation and injunctive relief under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. § 9601 *et seq.* commonly referred to as the “Superfund” law. *See* Complaint, ¶¶ 2, 70-89. More specifically, the State Plaintiffs are pursuing a “Cost Recovery” claim pursuant to 42 U.S.C. § 9607 and a “Natural Resource Damages” claim pursuant to 42 U.S.C. § 9607. *Id.* Under the Cost Recovery claim, the State Plaintiffs have prayed for an award of all “past and present necessary response costs” which they have generically described as the “costs of monitoring, assessing and evaluating water quality, wildlife and biota in the IRW.” Complaint, ¶ 76. Under

the Natural Resource Damages claim, the State Plaintiffs ask for an unspecified award of “damages for injury to, destruction of and loss of . . . natural resources in the IRW including, but not limited to (a) the cost to restore, replace, or acquire the equivalent of such natural resources; (b) the compensable value of lost services resulting from injury to such natural resources; and (c) the reasonable cost of assessing injury to the natural resources and the resulting damages.” Complaint, ¶ 89.

For purposes both of the Cost Recovery claim and the Natural Resources Damages claim, the Complaint includes the following description of the geographic area(s) which the State Plaintiffs contend constitute or comprise the “facility” which is an essential element for both of the CERCLA claims:

The IRW, including the lands, waters and sediments therein, constitutes a ‘site or area where a hazardous substance . . . has been deposited, stored, disposed of, or placed, or otherwise come to be located; . . .’ and, as such, constitutes a ‘facility’ within the meaning of CERCLA, 42 U.S.C. § 9601(9). Furthermore, the grower buildings, structures, installations and equipment, as well as the land to which the poultry waste has been applied, also constitute a ‘facility’ within the meaning of CERCLA, 42 U.S.C. § 9601(9), from which the ‘releases’ and/or ‘threatened releases’ of ‘hazardous substances’ into the IRW, including the lands, waters and sediments therein, resulted.

See Complaint, ¶¶ 72, 81.

III. LEGAL AUTHORITY AND ARGUMENT

The present motion seeks an order from the Court requiring the State Plaintiffs to replead the allegations of Counts 1 and 2 of the Complaint. As presently cast, the allegations of Counts 1 and 2 of the Complaint do not provide the Tyson Defendants with sufficient notice as to the geographic area(s) which the State Plaintiffs are contending constitute the “facilities” or “Superfund sites” which they claim the Tyson Defendants are, among other things, obligated to

clean up or remediate.² The allegations of the Complaint pertinent to Counts 1 and 2 are so vague and ambiguous as to warrant entry of an order under Rule 12(e) of the Federal Rules of Civil Procedure.

With respect to Rule 12(e), the Tenth Circuit Court of Appeals has held that “if the language employed to state the claim is not sufficiently definite and particular to enable the adversary to prepare his responsive pleadings or to prepare for trial, the remedy is a motion for a more definite statement ... under Rule 12(e) of the Federal Rules of Civil Procedure.” *Clyde v. Broderick*, 144 F.2d 348 (10 Cir. 1944). Stated conversely by an Oklahoma federal district court, “[i]f Plaintiff’s claim in the Complaint is sufficiently definite to enable the Defendant to know what is charged, it is sufficiently definite to overcome a Rule 12(e) Motion as the Defendant is reasonably able to respond, knowing whether or not it did the things charged.” *Feldman v. Pioneer Petroleum*, 76 F.R.D. 83 (W.D. Okla. 1977).

The courts have generally interpreted the “facility” definition in CERCLA to encompass both the initial site where a hazardous substance is disposed of and additional sites to which the substances may have migrated. *See, e.g., Nutrasweet Co. v. X-L Eng’g Co.*, 933 F. Supp. 1409, 1418 (1999). In the present case, the Complaint generically references “land to which poultry waste has been applied” (Complaint, ¶¶ 72, 81), but it fails to identify with any specificity the location of *any* parcel of land on which the State Plaintiffs contend poultry litter containing a hazardous substance has actually been applied.

² “Two of [CERCLA’s] primary goals include ‘encouraging the timely *cleanup* of *hazardous waste sites*’ and placing the cost of that cleanup on those responsible for creating or maintaining the hazardous condition” *Consolidated Edison Company of New York, Inc. v. UGI Utilities, Inc.*, 2005 WL 2173585, 2 (2nd Cir.) (quoting *Control Data Corp. v. S.C.S.C. Corp.*, 53 F. 3d 930, 935-36 (8th Cir. 1995)) (emphasis added). “CERCLA’s purposes include furthering the recovery of costs for cleanup of *hazardous waste sites* from persons liable therefore and inducing those persons voluntarily to pursue appropriate environmental response actions.” *Id.* at 3 (emphasis added).

Likewise, the Complaint fails to identify any single location to which they contend poultry litter containing a hazardous substance has migrated. Instead, the State Plaintiffs are content to declare the entire “1,069,530 acre Illinois River Watershed (‘IRW’)” a facility. Complaint, ¶¶ 22, 72, 81.³ This approach is materially identical to a purported “facility” definition rejected by the Third Circuit Court of Appeals in the recent Superfund case of *New Jersey Turnpike Auth. v. PPG Indus., Inc.*, 197 F.3d 96 (3d 1999). In that case, the plaintiffs were pursuing a contribution claim against the defendants for the contamination of sites along the eastern spur of the New Jersey Turnpike with chromate ore processing residue (“COPR”). *Id.* at 99. The plaintiffs had identified and confirmed the presence of COPR at seven specific sites along the eastern spur of the New Jersey Turnpike. *Id.* However, the plaintiffs could not “show that COPR from [defendants] facility was deposited on any of the sites at issue.” *Id.* at 105. Consequently, the plaintiffs in that case (much like the State Plaintiffs in this case) alleged that the “entire eastern spur of the turnpike was the ‘facility’.” *Id.* at 105. The district court rejected plaintiffs’ overly broad and vague description of the facility and dismissed the case. *New Jersey Turnpike Auth. v. PPG Indus., Inc.*, 16 F. Supp. 2d 460, 472 (D. N.J. 1998). That decision was affirmed on appeal. The Third Circuit, in affirming the district court’s ruling reasoned:

Allowing the “facility” to be the entire eastern spur, where the Turnpike’s claim seeks costs relating to seven specific sites, would result in an unwarranted relaxation of the “nexus” required. If the Turnpike seeks contribution for contamination at the sites, it may not merely prove deposits occurred along the “eastern spur”.

New Jersey Turnpike Auth., 197 F.3d at 105.

If the State Plaintiffs are alleging that each of the thousands of legally distinct, individually owned and readily identifiable parcels of land in the IRW and every cubic foot of

³ According to the Complaint, the IRW “straddles the Oklahoma-Arkansas border” with the Oklahoma portion of the IRW stretching across at least four Eastern Oklahoma counties. *Id.*

water and sediments found in each of the creeks, streams and tributaries flowing through the IRW have been contaminated with “hazardous substances” from poultry litter applications such that a designation of the entire IRW as a “facility” could arguably be justified, then they should make that allegation clear in the Complaint. If, as the Tyson Defendants suspect, the State Plaintiffs are not making such an allegation, then they must specifically identify those parcels of land and segments of streams, creeks and tributaries which they allege have been contaminated with “hazardous substances” from poultry litter applications by the “Poultry Integrator Defendants” or the contract growers with whom those defendants contract.

Simply put, under the current status of the CERCLA allegations by the State Plaintiffs, this Court and the Tyson Defendants are presented with a purported “Superfund” lawsuit which fails to disclose the location of the “Superfund Sites.” Without identification of the specific locations which the State Plaintiffs claim have been contaminated and are in need of clean up, the Tyson Defendants cannot accurately and appropriately respond to the allegations in Counts 1 and 2 of the Complaint. The actual locations of the “facility” or “facilities” must be identified in order for the Tyson Defendants to reasonably respond to the Complaint and to begin preparing for the trial of this matter.

III. CONCLUSION

For the foregoing reasons, the Tyson Defendants request that this Court order directing the State Plaintiffs to provide a more definite statement with respect to Counts 1 and 2 of the Amended Complaint.

Dated: October 3rd, 2005

Respectfully submitted,

/s/ Stephen Jantzen

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October 2005, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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